IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRUCE R. LEGASSIE,

Petitioner, No. CIV S-02-2076 LKK KJM P

vs.

R.L. RUNNELS, et al.,

Respondents. FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with a writ of habeas corpus under 28 U.S.C. § 2254. Respondent has filed an answer, arguing that the state court determination upholding the petitioner's conviction is valid and also that the petition is "mixed" because it contains one unexhausted claim.

I. Factual and Procedural Background

Petitioner was convicted of robbery with use of a firearm in Shasta County and sentenced to a total term of twenty-one years.

Petitioner appealed his conviction to the Court of Appeal for the Third Appellate District, raising five issues: the trial court erred in refusing to grant a mistrial based on irregularities in the jury selection process; the trial court erred in refusing to grant a mistrial after a witness alluded to petitioner's criminal record; the trial court erred in permitting a police officer

to give his opinion about a jacket found during the search of petitioner's apartment; the trial court erred in refusing to instruct the jury on conspiracy; and the trial court erred in instructing the jury in the language of CALJIC No. 17.41.1. Answer, Ex. A (Appellant's Opening Brief) at I, 51.

The Court of Appeal affirmed petitioner's conviction in a memorandum filed May 11, 2001. Answer, Ex. B (opinion).

Petitioner then filed a Petition for Review in the California Supreme Court, raising the same five issues. Answer, Ex. C (Petition for Review) at I. Review was denied on August 22, 2001. Answer, Ex. D (Supreme Court denial).

On October 28, 2002, petitioner filed the instant action, raising the same five grounds raised in his state petitions.

Based on its own review of the transcripts, the court adopts the state Court of Appeal's statement of the prosecution's case, which accurately reflects the evidence presented at trial.

> Eighteen year-old Stephanie Cruz had known defendant for about four and one-half years. Their relationship evolved from one of boyfriend and girlfriend to one characterized by Cruz as brother and sister.
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> During the first week in August 1999, defendant stopped by Cruz's apartment . . . and told her he needed to speak with her. Ronnie Kyles, a recent acquaintance of Cruz, was sitting in her living room when defendant arrived.
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> Defendant and Cruz went into her spare bedroom where defendant told her he had a plan to rob a Subway Sandwich Shop (hereafter Subway) in Anderson. Defendant explained that he wanted to commit the crime around closing time. . . so there would be fewer witnesses, and he was going to use a gun for protection. He also indicated that he wanted a driver so he would not have to commit the offense by himself. Defendant did not ask Cruz to do anything to help him and she did not ask to participate. . . .
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> . . . [T]hey returned to the living room where defendant and Kyles introduced themselves and conversed. . . . [T]he two men discussed the possibility of robbing the Subway in Anderson. . . . [and] agreed to commit the robbery. Cruz was not asked to participate and she did not expect to do so.

A couple of days later, defendant returned to Cruz's apartment with a gun that he carried in a guitar case. He showed Cruz the gun and told her he was going to use it in the robbery. Without asking Cruz's permission, defendant placed the gun under her bed. . . . .

The following day, August 9th, at approximately 8 p.m., defendant again returned to Cruz's residence and told her this was the night they were going to commit the robbery. About five minutes later, Kyles arrived. The two men retrieved the gun from beneath Cruz's bed . . . . Defendant had a ski mask and a green jacket. . . .

At approximately 9:45 p.m., Subway employees, Torrie and Amber McDonald, were preparing to close down the business when a "tall guy came in, completely covered, carrying a shotgun." He cocked the gun, pointed it at Torrie and told her to get on the floor. . . .The gunman's face was covered with a ski mask, he had a hood on over the mask, and was wearing jeans. The only part of his face that was visible was the bridge of his nose and his glasses.

. . . . . .

A second unarmed assailant directed both employees to lie on the floor. This assailant's face was also covered by the hood of his jacket which was pulled tightly around his face, leaving only his eyes visible. Defendant removed all the money from the registers and placed it in his jacket pocket.

The armed assailant looked around for more money, and when he was unable to find any, ordered Torrie to get up and show him where it was kept. . . . [T]he petty cash . . . in a North Valley Bank bag, was sitting near the main register along with a manila envelope containing $100 and bearing the initials of numerous employees. The armed assailant took the bank bag, $60 or $80 in rolled quarters, and the manila envelope. In total, the robbers took approximately $800.

. . . . . .

Approximately one hour later, defendant and Kyles returned to Cruz's apartment. Defendant appeared happy and excited because he had successfully robbed the Subway. . . . [D]efendant, Kyles, and Cruz went into her bedroom where the two men told her what happened. One of them was carrying a North Valley Bank bag containing a manila envelope and the money they had taken from the Subway. They divided the money evenly, and then Kyles tossed one remaining roll of quarters to Cruz. . . . [T]he men left the bank bag and manila envelope on the bedroom floor.

On September 1, 1999, Officers Robert Curato and Dale Webb . . . went to Stephanie Cruz's apartment unannounced. . . . [S]he agreed to speak with the officers and gave them permission to search her

> apartment. They found the stolen bank bag in her front room and when they asked her about it, she advised them it was the bag defendant and Kyles had carried into her apartment on the night of the robbery. The officers also found a manila envelope in a desk drawer in Cruz's bedroom, which was identified . . . as the one taken during the robbery.
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> The following day . . . Officer Curato executed a search warrant of defendant's house and found a green jacket . . . .
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> At trial, Torrie described the armed assailant as White, approximately 6'4" to 6'5" in height, and between 180 to 190 pounds in weight and identified defendant as the armed assailant. . . . She based her in-court identification on the similarity between defendant's height, glasses, nose and those of the armed robber.
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> Amber described the armed assailant as very tall and slender, around 6'3" or 6'4", wearing glasses. He was wearing an Army-type jacket and a mask. At trial, she identified defendant as the armed assailant . . . . Additionally, Torrie and Amber identified the green Army-type jacket recovered from a closet in defendant's home, as the jacket worn by the armed assailant during the robbery. . . .

Answer, Ex. B at 1-6 (footnotes omitted).

II. AEDPA Standards

An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a).

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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Although "AEDPA does not require a federal habeas court to adopt any one methodology," Lockyer v. Andrade, 538 U.S 63, 71 (2003), there are certain principles which guide its application.

First, the "contrary to" and "unreasonable application" clauses are different. As the Supreme Court has explained:

> A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in Williams [v. Taylor, 529 U.S. 362 (2000)] that an unreasonable application is different from an incorrect one.

Bell v. Cone, 535 U.S. 685, 694 (2002). It is the habeas petitioner's burden to show the state court's decision was either contrary to or an unreasonable application of federal law. Woodford v. Visciotti, 537 U.S. 19, 123 S. Ct. 357, 360 (2002). It is appropriate to look to lower court decisions to determine what law has been "clearly established" by the Supreme Court and the reasonableness of a particular application of that law. See Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 2000).

Second, so long as the state court adjudicated petitioner's claims on the merits, its decision is entitled to deference, no matter how brief. Lockyer, 538 U.S. at 76; Downs v. Hoyt, 232 F.3d 1031, 1035 (9th Cir. 2000). However, when the state court does not issue a "reasoned opinion," this court must undertake an independent review of the claims. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2002).

Third, in determining whether a state court decision is entitled to deference, it is not necessary for the state court to cite or even be aware of the controlling federal authorities "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v.

Packer, 537 U.S. 3, 8 (2003). Moreover, a state court opinion need not contain "a formulary statement" of federal law, so long as the fair import of its conclusion is consonant with federal law. Id.

III. Irregularities In Jury Selection (Ground One)

In California, a criminal defendant is entitled to ten peremptory challenges to prospective jurors if he is facing a term of years. Cal. Code Civ. Proc. § 231(a). In this case, the court elected to use an "undesignated alternate" system, which

> would add an additional two peremptory challenges to each side, so they would then have 12 peremptory challenges each.

RT 2.[1] After several rounds of challenges, the court explained:

> [T]here are 12 seated in the soft seats. And then there are two or four seated in the front hard seats. The 14 – the first 14 will be the jury.

RT 116. When the prosecutor expressed his confusion about his use of peremptories, the court said he could use a challenge against any of the fourteen then in the box. RT 117.

After some initial discussion of hardship and other disqualifying factors, the court had the clerk call eighteen people to the jury box. RT 50-52. During the court's questioning, three jurors were excused for cause. RT 61, 65-66. From the remaining group of fifteen, the parties exercised two each of their peremptory challenges. RT 87-88 (Evenson, Steele, McHatton, McPhail).

The court then had the clerk call seven names to fill the box with its complement of eighteen prospective jurors. RT 88. After these seven were questioned, the parties again exercised peremptory challenges: the prosecutor exercised four challenges and the defense, three. RT 97-98.

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[1] "RT" refers to the reporter's transcript of the Shasta County proceedings, which are lodged with this court.

An additional group of seven prospective jurors was summoned to the box. RT 98-99. Two of this group were excused for cause, RT 102-103, before the parties began on their third round of peremptory challenges: the prosecution used an additional two; the defense, an additional three. RT 105-106.

The fourth group of seven was seated and questioned. RT 106-107. Prospective juror Wetmore was excused for cause. RT 109. In the fourth round of peremptory challenges, the prosecutor exercised an additional three; the defense, one. RT 115-117. It was before exercising his last challenge to this group that the prosecutor expressed confusion; the judge responded, "I think you can go ahead, and we can expand to it *[sic]* 14. . . ." RT 117. Defense counsel then asked the court "to call some more" before he exercised his next challenge, "since we have less than what would actually be stated *[sic]* during the trial." RT 117.

The court called an additional five prospective jurors to the box. RT 118. The defense used its tenth challenge, RT 122, and then both sides accepted the jury. RT 123. The court sent prospective jurors Stevens, Terrell, and Matthews to the audience and swore the remaining fourteen. RT 123.

Defense counsel objected to the procedure the following morning, arguing that it had been improper to exercise peremptory challenges as to less than fourteen prospective jurors, a full panel under the court's undesignated alternate procedure and California Code of Civil Procedure section 231(d). The problem, he explained, was "that we did not have the entire panel of 14 at all times. We did a lot of the time, but we didn't at least two or three times." RT 144-145.[2] Counsel argued that while he had not used his last two peremptory challenges, the error had already occurred and he was "stuck in a situation" where his ability to influence the jury by

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[2] Defense counsel exercised his second peremptory challenge with regard to a panel of twelve, RT 88, his fifth to a panel of thirteen, RT 98, and his eighth to a panel of twelve. RT 106. Although the state Court of Appeal calculates the size of these panels slightly differently, on the relevant point it also concludes that each of the panels comprised less than fourteen members. See Answer, Ex. B, n.8.

his choices had been compromised. RT 147-148.

The court noted the objection for the record, but denied the motion for mistrial. RT 147-148.

Petitioner challenged the practice on appeal, arguing again that the procedure violated California Code of Civil Procedure section 231(d) and his right to federal due process. Answer, Ex. A (Appellant's Opening Brief) at 17-30. The Court of Appeal declined to reach the merits, however, but found the issue waived by counsel's failure to object to the procedure until after the jury was sworn. Answer, Ex. B at 8-12.

Respondent argues the Court of Appeal's ruling acts as a procedural default that bars this court from reaching the merits and, in the alternative, that any irregularities in the procedure do not present a federal question. Answer at 13-14.

A federal court will not review a claim of federal constitutional error raised by a state habeas petitioner if the state court determination of the same issue "rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991). This rule also applies when the state court's determination is based on the petitioner's failure to comply with procedural requirements, so long as the procedural rule is an adequate and independent basis for the denial of relief. Id. at 730. For the bar to be "adequate," it must be "clear, consistently applied, and well-established at the time of the [] purported default." Fields v. Calderon, 125 F.3d 757, 762 (9th Cir. 1997). For the bar to be "independent," it must not be "interwoven with the federal law." Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). If an issue is procedurally defaulted, a federal court may not consider it unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 749-50.

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In Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir.), cert. denied sub nom. Blanks v. Bennett, 540 U.S. 938 (2003), the Ninth Circuit held:

> Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

Although respondent has pled the existence of a procedural bar, petitioner, who has not filed a traverse, has presented nothing suggesting the inadequacy of the procedure nor has the court found such authority.

In support of its waiver determination, the Court of Appeal cited three cases. Answer, Ex. B at 11. In two of those, People v. Cudjo, 6 Cal. 4th 585, 628 (1993) and People v. Ervin, 22 Cal. 4th 48, 73 (2000), the defendants stipulated to jury selection procedures they later challenged on appeal, which limits their application to this case. In People v. Johnson, 6 Cal. 4th 1, 23 (1993), defense counsel objected to a particular juror not when that person was first selected as an alternate, but only when he replaced a juror who had been excused. The Supreme Court noted the objection came too late, because "[o]bjections to the jury selection process must be made when the selection occurs." Moreover, in several other cases, the California Supreme Court has found an objection to a jury made after the jury was sworn was too late to preserve the issue for appeal. People v. Sirhan, 7 Cal.3d 710, 751-52 (1972), overruled on other grounds, Hawkins v. Superior Court, 22 Cal. 3d 584 (1978) (objection to the venire); People v. Olivera, 127 Cal. 376, 379-80 (1899) (names of prospective jurors selected from incomplete panel; objection after the jury was sworn was too late).

Petitioner has neither challenged the adequate and independent nature of the procedural bar asserted by respondent, nor argued that cause and prejudice exists to permit this court to reach the merits of his claim. Accordingly, the court cannot reach the substance of

petitioner's claim of error based on the jury selection procedures.

IV. Mistrial Based On Cruz's Slip-Of-The-Tongue (Ground Two)

A. Background

Stephanie Cruz described how Ronnie Kyles and petitioner met at her apartment, "kind of introduced themselves," and "got into a conversation about how they had been in jail, and the things that they had done, blah, blah, blah. Well, sorry. So on, and so on." RT 255-256. Petitioner personally told the court that some jurors looked at him and shook their heads immediately after this testimony. RT 257.

Defense counsel asked to approach the bench and the court excused the jury. RT 256. Counsel complained that Cruz had done "just what I feared she might" and moved for a mistrial. RT 256-257. The court denied the motion and instructed the jury:

> Ladies and gentlemen, I am admonishing you to disregard the last statement of the witness before we took the break. You should not consider that testimony, nor allow that testimony to influence your decision in this case.

RT 262.

The prosecutor then asked Cruz whether, "during the course of the conversation," petitioner had mentioned his plan to rob Subway. RT 262-263. Defense counsel again objected, because the question referred the jury's attention back to petitioner's and Kyles' discussion "about how they had been in jail." RT 319-320. The court again denied counsel's motion for a mistrial. RT 320.

On appeal, petitioner challenged the ruling, arguing that the court's admonition could not cure the harm. Answer, Ex. A at 34-38.

The Court of Appeal agreed that Cruz's indiscretion was error, but held the trial court did not abuse its discretion in denying the motion for a mistrial:

> First, Cruz's comment was brief and limited (she did not indicate that defendant was convicted of a felony or on parole), the comment was not repeated, and was not exploited in argument to

> the jury. Second, the trial court immediately admonished the jury to disregard Cruz's statement and not to let it influence its decision. Because there is no evidence to indicate the jury failed to comply with this admonition, it must be presumed the jury understood and followed it and that any harm was cured.
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> Defendant claims the admonition failed to cure the prejudice from Cruz's statement because the prosecutor's next question referred back to the conversation the court had just instructed the jury to disregard, implying that the conversation took place and revived Cruz's statement that defendant had been in jail. We disagree.
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> . . . . Because neither the prosecutor nor Cruz made any further reference to defendant's prior record or jail time, there is no reason to believe the jury failed to adhere to the court's admonition.

Answer, Ex. B at 16-17 (internal citations omitted).

B. Failure To Exhaust

Respondent argues that petitioner is challenging not only the court's refusal to grant his motion for a mistrial but also the prosecutor's failure adequately to admonish Cruz not to mention petitioner's past. Answer at 17.

The United States Supreme Court has held that a federal district court may not entertain a petition for habeas corpus unless the petitioner has exhausted state remedies with respect to each of the claims raised. Rose v. Lundy, 455 U.S. 509 (1982). A mixed petition containing both exhausted and unexhausted claims must be dismissed.

Petitioner's argument heading refers only to the court's refusing to grant his motion for a mistrial after Cruz's comment. Pet. (continuation page hand labeled "ground two"). In the body of his argument, petitioner alludes to the prosecutor's failure to guard against inadmissible testimony from his witnesses, but this is only part of the broader argument. The undersigned does not read ground two as an unexhausted claim.

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C. Inadmissible Evidence And Curative Instructions

The Ninth Circuit has held:

> [T]he admission of evidence in state court is not subject to federal habeas review unless the admission of the testimony was arbitrary or fundamentally unfair.

Drayden v. White, 232 F.3d 704, 710 (9th Cir. 2000) (internal quotation, citation omitted). The Supreme Court has recognized that

> Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. A defendant is entitled to a fair trial but not a perfect one.

Bruton v. United States, 391 U.S. 123, 135 (1968) (internal quotation, citation omitted). Moreover, juries are presumed to follow an instruction to disregard inadmissible evidence. Greer v. Miller, 483 U.S. 756, 767 n.8 (1987).

The California Court of Appeal did not apply these principles unreasonably. It relied on the brief and ambiguous nature of the comment, which was not repeated by counsel, and on the curative instruction given by the court. This court also cannot find that the prosecutor's later reference to the conversation between Kyles and petitioner somehow overcame the court's prior curative instruction: Cruz did not allude to petitioner's jail time, but only to the discussion of the Subway robbery. This claim of error does not provide a basis for habeas relief.

V. Curato's Opinion (Ground Three)

Officer Curato described finding a green jacket during the search of petitioner's home and explained he seized it because

> It matched the descriptions given by the two clerks at the Subway Sandwich Shop. And also matched the description that Stephanie Cruz had given us of the jacket that Mr. Legassie had worn at her apartment on the night the robbery occurred. And when I saw that jacket, it was my belief that that was the jacket that was used during the robbery.

RT 406. Defense counsel objected, but the court permitted the testimony to stand because "it's

his opinion." RT 406. On appeal petitioner argued the inadmissible opinion testimony was akin to the officer's opinion that petitioner was guilty. Answer, Ex. A at 39-41.

The Court of Appeal rejected petitioner's argument:

> We do not interpret Officer Curato's statement to be a conclusion of *fact* that the jacket was the same one worn by the robber but rather a statement of his *belief* that the jacket was the one worn by the robber. In that context, it was not an inadmissible lay opinion on a crucial fact but rather a description of the officer's state of mind which was necessary to explain why he seized the jacket.
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> However, even if the jury understood the officer's testimony to be anything other than a simple explanation for why he seized the jacket, the error was harmless.

Answer, Ex. B at 22 (emphasis in original, citations omitted).

Whether the admission of evidence raises a federal question depends on whether its impact is so prejudicial as to violate a defendant's right to a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 70 (1991).

In Dubria v. Smith, 224 F.3d 995 (9th Cir. 2000) (en banc), cert. denied, 531 U.S. 1148 (2001), the Ninth Circuit noted that while the testimony of law enforcement officers "often carries an aura of special reliability and trustworthiness," it would "not assume that opinions of an investigating officer are presumptively prejudicial." 224 F.3d at 1001 & n.3 (internal quotations, citations omitted). To determine whether an officer's testimony had prejudicial impact, a court must examine it in context. Id. If the challenged testimony addresses only "evidence or theories of the case" presented at trial, there is no error. Id.

The state Court of Appeal's conclusion was neither an unreasonable determination of the facts of the case nor an unreasonable application of federal law. Curato explained that he seized the jacket because, based on his interviews with the witnesses, he believed it was the one worn in the Subway robbery. Indeed, on cross-examination, he explained "his mindset" when he

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seized the jacket was based on

> the description that the two clerks . . . had given, what I hade scene [sic] of the jacket on the videotape, the color description, the length of the jacket, on the person I had seen it on. And just the cut of the jacket. When I looked at the jacket. . . that, in my mind, matched what I had seen on the video.

RT 425. Moreover, the jury saw the videotape of the robbery and could compare the jacket Curato seized and that worn by the robber. CT 42; RT 408 (videotape admitted); see also RT 639 (videotape available to jury during deliberations). Curato's comment was tied strictly to evidence before the jury and the prosecution's theory of the case. There was no federal constitutional error.

VI. Co-Conspirator Instructions (Ground Four)

During the jury instruction conference, defense counsel asked that the jury be instructed on the concept of an uncharged conspiracy, the notion that the conspiratorial agreement could be proved circumstantially, and the liability of any conspirator for the ultimate crime. RT 522-523. Counsel argued that these instructions were necessary background to the jury's consideration whether Cruz was an accomplice whose testimony was insufficient for a conviction unless corroborated. Cal. Penal Code § 1111; RT 523. The court refused to so instruct, though it did tell the jury that it

> cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect that defendant with the commission of the offense. Testimony of an accomplice includes any out–of-court statement purportedly made by an accomplice, received for the purpose of proving what the accomplice stated out of court was true.

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> To corroborate the testimony of an accomplice, there must be evidence of some acts or fact related to the crime, which, if believed, by itself, and without any aid, interpretation, or direction from the testimony of the accomplice tends to connect the defendant with the commission of the crime charged. However, it is not necessary that the evidence of corroboration be sufficient, in itself, to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies.

RT 581-582; CT 93-95. The court also instructed that the testimony of an accomplice must be viewed with distrust and told the jury it must decide whether Cruz was an accomplice. RT 582-583; CT 97-98.

The state Court of Appeal rejected the claim on appeal:

> [W]e conclude the trial court had no duty to instruct on the law of conspiracy because there was no substantial evidence to support a finding that Cruz was a member of the conspiracy.
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> . . . . . .
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> . . . . . .
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> [A]s stated above, conspiracy is a specific intent crime which requires proof that the person had the intent to agree or conspire and the intent to commit the agreed upon target offense. Here there is no evidence to establish that Cruz expressly or tacitly agreed to commit the robbery, either by her words or by her actions. To the contrary, she was not asked to participate in the robbery, she did not offer to participate, and she was not involved in the commission of the robbery. Nor did she engage in any acts that suggested she intended to commit the robbery. At most, the evidence established that she was a passive or silent facilitator of the crime by virtue of her failure to protest when defendant used her apartment to store his gun and to meet Kyles before committing the robbery.
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> Nor do we think the fact Kyles tossed Cruz a few dollars in quarters indicates that she was a co-conspirator. To the contrary, the disparity in the spoils received by Cruz (one roll of quarters) and by defendant and Kyles (about $400 each), suggests that she was not a partner in the scheme to commit the robbery. . . .
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> Nevertheless, even if the trial court erred by failing to give the requested instructions, the failure is harmless. [fn. 19]. The failure to instruct on accomplice testimony pursuant to section 1111 is harmless where there is sufficient corroborating evidence in the record, evidence that tends to implicate the defendant and relates to

> some act or fact which is an element of the crime. . . .
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> Here there was sufficient corroborating evidence to implicate defendant in the robbery. . . . [B]oth Torrie and Amber identified defendant as the armed assailant on the basis of his height, weight, and glasses, and Torrie also recognized his nose. They also identified the green jacket that was recovered from defendant's residence and depicted in the videotape as the one worn by the armed assailant.
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> fn. 19. Citing *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed. 2d, 175, 180] and *People v. Marshall* (1996) 13 Cal. 4th 799, 850-851, defendant claims the error must be tested under the federal constitutional standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711] because the instructional error deprived him of findings he was entitled to and thus violated his federal right to due process. Defendant cites no authority to support his claim that failure to give the requested instruction violates a state-created liberty interest, nor do we find one. Defendant was not charged with conspiracy and there is no statutory requirement that the jury make "findings" regarding accomplices. . . .

Answer, Ex. B at 28-31 (internal citations omitted except as included in text of opinion).

> The Supreme Court has held:
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> The Fourteenth Amendment does not forbid a state court to construe and apply its laws with respect to the evidence of an accomplice.

Lisenba v. California, 314 U.S. 219, 227 (1941); see also Harrington v. Nix, 983 F.2d 872, 874 (8th Cir. 1993) ("state laws requiring corroboration do not implicate constitutional concerns that can be addressed on habeas review"); Brown v. Collins, 937 F.2d 175, 182 n.12 (5th Cir. 1991) ("the prosecution's failure to satisfy the requirements of the accomplice-witness sufficiency rule, and a state court's failure to enforce that purely state rule, simply would not warrant constitutional attention").

Petitioner argues, however, California Penal Code section 1111[3] creates a liberty

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[3] Section 1111 provides, in pertinent part:

> A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to

interest in jury findings on the questions whether a witness is an accomplice and has been corroborated. Pet. (continuation page "7" of ground four argument). In Hicks v. Oklahoma, 447 U.S. 343, 345-46 (1980), the Supreme Court recognized that a state statute may create a liberty interest in certain procedures being followed in criminal proceedings. At issue in Hicks was an Oklahoma statute that gave a convicted defendant the right to have the jury fix punishment; the Supreme Court found federal constitutional error in a case where the judge, not the jury, imposed a mandatory prison term. Id. at 346. In Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000), the Ninth Circuit acknowledged that the interaction of section 1111 and Hicks might federalize a claim that a conviction was based solely on the uncorroborated testimony of an accomplice.

Neither Hicks nor LaBoa support petitioner's argument, however. Section 1111 says only that uncorroborated accomplice testimony is not sufficient evidentiary support for a conviction; it says nothing about the sufficiency of the jury instructions on the subject. Petitioner has not pointed to any clearly established federal authority suggesting that a state statute that establishes an evidentiary standard for conviction gives a defendant a liberty interest in any particular type of jury instruction, nor has he challenged the sufficiency of the evidence in support of his convictions. He has not shown he is entitled to federal habeas relief.

VII. CALJIC No. 17.41.1 (Ground Five)

The court instructed the jury in the language of CALJIC No. 17.41.1, which informs the jury, in part, that if "any juror refuses to deliberate or expresses an intention to disregard the law, or to decide this case based upon some improper basis, such as penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately bring that to my attention. . . ." RT 570; CT 72.

> connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The Court of Appeal found the issue waived, but, in the alternative, noted :

> [N]othing in the record indicates defendant was prejudiced by the giving of CALJIC No. 17.41.1. A verdict was reached after deliberations commenced, with no indication of deadlock or holdout jurors. We will not infer that CALJIC No. 17.41.1 had any impact prejudicing defendant.

Answer, Ex. B at 32-33. This court may reach the merits of the claim without first resolving the question of waiver under state law. Lambrix v. Singletary, 520 U.S. 518, 525 (1997).

In Brewer v. Hall, 378 F.3d 952 (9th Cir.), cert. denied, __U.S. __, 125 S. Ct. 814 (2004), the Ninth Circuit rejected a challenge to the same instruction:

> It is clear, however, that the California appellate court's holding was not contrary to or an unreasonable application of clearly established Supreme Court precedent, because no Supreme Court case establishes that an instruction such as CALJIC 17.41.1 violates an existing constitutional right.

378 F.3d at 956. Petitioner is not entitled to relief on this ground.

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections

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shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: July 5, 2005.

UNITED STATES MAGISTRATE JUDGE

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